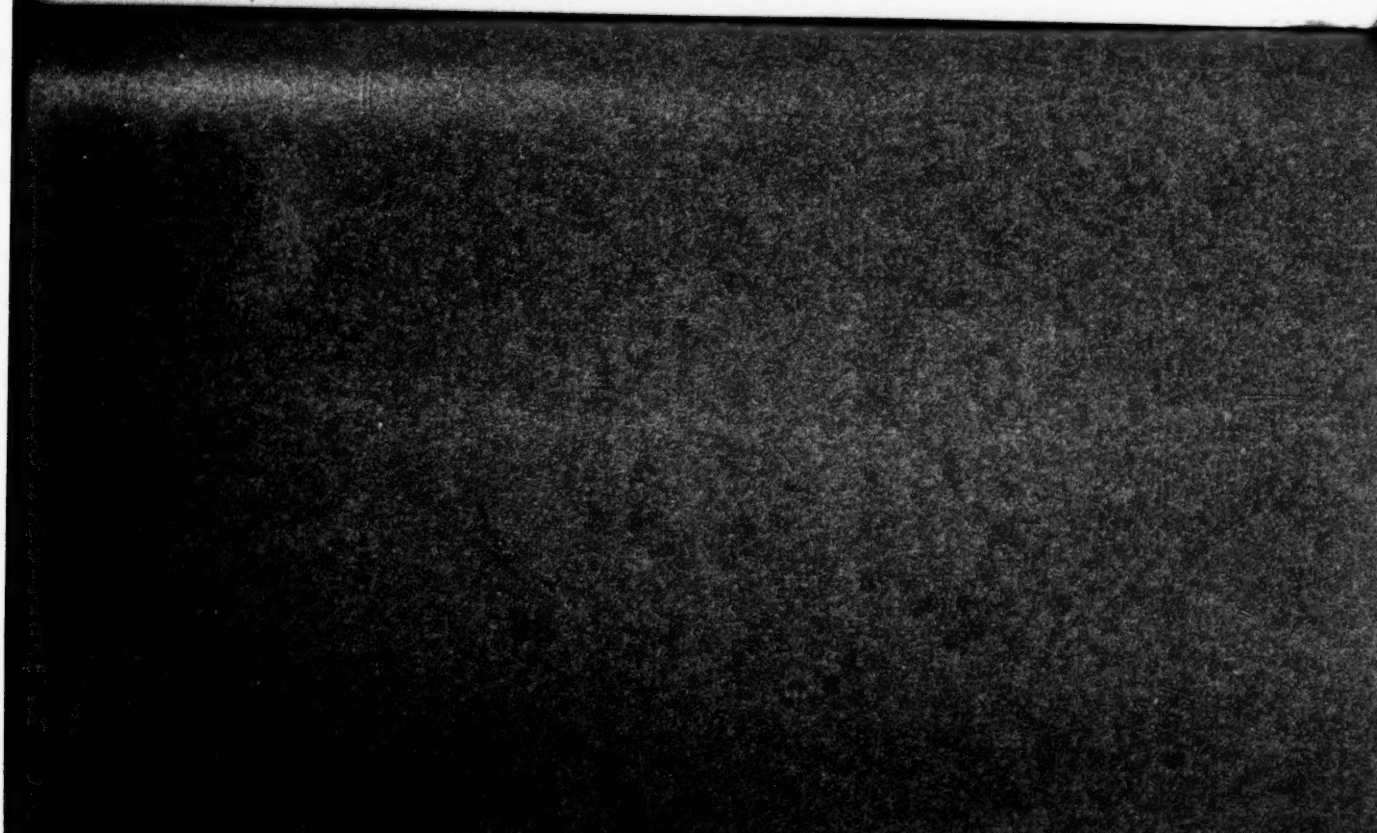


In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANTS,
v.
JOHN SMITH.
} No. 184.

BRIEF FOR APPELLANTS.

STATEMENT.

On November 20, 1897, appellee enlisted in the United States Navy as a fireman of the second class to serve for three years from that date, unless sooner discharged by proper authority (R., 11, 20).

On May 26, 1899, he was serving under said enlistment as a fireman of the first class, attached to and on board the U. S. S. *Yorktown*, which vessel was then at anchor in Iloilo Harbor, P. I., and one of the vessels of the Asiatic squadron of the United States Navy (R., 11). On the same day and vessel he was reported by his superior officer to the commanding officer of said vessel as having refused to do duty, and the commanding officer awarded him the following punishment: "Put him under sentries as a prisoner in single

irons for safe-keeping, to await trial by general court-martial;" and he was continuously held as a prisoner thereafter on said vessel until July 5, 1899, when, at 10 o'clock a. m., he was brought by the chief master of arms of his vessel before a general court-martial then duly met on board the U. S. S. *Princeton*, at Cavite, P. I., which had been duly convened for his trial for said military offense by virtue of a precept signed on board the U. S. S. flagship *Baltimore* on June 30, 1899, at Manila, P. I. (R., 17), by the rear-admiral commander in chief of the United States naval forces on the Asiatic station.

There is nothing in the record to show that there was any earlier opportunity to bring the prisoner before a general court-martial for trial for that offense.

On June 30, 1899, said rear-admiral preferred a charge in writing against said prisoner (the appellee) of "refusing to obey the lawful order of a superior officer," which specified the said offense (R., 18, C), and on the same day he transmitted said charge and specification to the judge-advocate of said general court-martial, which was then ordered to convene on board the U. S. S. *Monadnock*, at 10 o'clock a. m., on Monday, July 3, 1899, at Cavite, P. I., for the trial of such persons as might legally be brought before it. (R., 17, A.)

On July 1, 1899, at 10.30 o'clock a. m., said prisoner (the appellee) received a true copy of said charge and specification. (R., 13, 19.)

On July 3, 1899, the said rear-admiral ordered said general court-martial to hold its further sessions on

board the U. S. S. *Princeton*, at Cavite, P. I. (R., 18, A. B.)

On July 5, 1899, said prisoner (the appellee) was duly brought before and tried by said general court-martial on said charge and specification, and he was found "guilty" of said charge and specification, and sentenced as follows:

> To be confined, in such place as the Secretary of the Navy may direct, for a period of one year; to perform extra police duties during such confinement; to lose all pay that may become due him during such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy. Total loss of pay amounting to three hundred and seventy-six dollars ($376). (R., 16.)

On July 7, 1899, the proceedings, findings, and sentence in the said general court-martial case of the appellee were approved by the said rear-admiral, and the U. S. S. *Yorktown* was then designated as the place of confinement of the prisoner until an opportunity should offer for sending him to the United States in a public conveyance. (R., 17.)

Judgment was entered in the court below on the second amended petition in favor of the claimant for $376. (R., 27.)

All the facts of this statement are clearly set forth in the findings of fact in this record, pages 11–22.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the said general court-martial had no jurisdiction to try the said prisoner (the appellee, John Smith), on the ground that he was not furnished on the very day upon which he committed the offense (namely, on May 26, 1899), for which he was afterwards tried, convicted, and sentenced by the said general court-martial, with a true copy of the charge and specification of the offense for which he was so tried.

2. The court below erred in holding that the proceedings, trial, conviction, and sentence of the said prisoner by said general court-martial were null and void, because he was not furnished, on said May 26, 1899, with a true copy of said charge and specification.

3. The court below erred in rendering a judgment against the United States in this cause, because the said prisoner (the appellee) was in fact furnished a true copy of the said charge and specification at 10.30 o'clock a. m. on July 1, 1899, which time was exactly four days before the said accused was produced for trial before said general court-martial. (R., 12, 13, 19.)

BRIEF OF ARGUMENT.

I.

a. The question of law involved is simply this:

WAS THE DELIVERY TO THE PRISONER (THE APPELLEE) ON JULY 1, 1899, OF THE TRUE COPY OF THE CHARGE AND SPECIFICATION OF THE OFFENSE WHICH HE COMMITTED ON MAY 26, 1899, AND FOR WHICH HE WAS TRIED, CONVICTED, AND SENTENCED ON JULY 5, 1899, BY A GENERAL COURT-MARTIAL, A SUFFICIENT COMPLIANCE WITH ARTICLE 43 OF THE ARTICLES WHICH GOVERN THE NAVY OF THE UNITED STATES? (Rev. Stat., Sec. 1624, pp. 275–283.)

This article reads as follows:

> Art. 43. The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge.

No other charge or specification was preferred against the prisoner, and the question therefore relates to *the time* of furnishing him "a true copy of the charge and specification" on which he was tried by the court-martial.

The majority of the court below have agreed, *as a conclusion of law*, that the prisoner *was not* furnished a

true copy of the charge and specification *at the time* contemplated by article 43, namely, *in their opinion*, on May 26, 1899. But all of the judges have found *as a fact* that he *was* furnished a true copy of said charge and specification on July 1, 1899.

b. The judgment appealed from is founded upon unreasonable interpretation of Article 43. "*It rests upon a construction which is too literal.*" (*United States* v. *Finnell*, 185 U. S., 236, 242.) *It well illustrates the maxim*, "*Qui hæret in litera, hæret in cortice.*"

The Court of Claims has no jurisdiction whatever to review the lawful sentence of any duly convened court-martial, nor to impugn by doubts the verity of its record or justice of its sentence. Consequently the doubts expressed in the last majority opinion of the court below (R. 23) as to the verity of the Court-Martial Record, and the integrity of the judge advocate, are entitled to no serious consideration here. Nor is the implied reflection upon the justice and fairness of the sentence of that general court-martial (R. 26, 27). All we have to say about such questions as these is that in this country courts-martial are courts of record—so far, at least, as the statute requires records to be made and preserved. Like our inferior courts they derive their jurisdiction from and are regulated by Congress (*Dynes* v. *Hoover*, 20 How., 65, 82); and no civil court can review their proceedings or sentences (*Ex parte Watkins*, 3 Pet., 193). They have general jurisdiction of all military offences. The act of Congress, passed more than a hundred years

ago, requires the president of every court-martial to administer an oath to the judge-advocate that he will "*keep a true record of the evidence given to and the proceedings of this court;* * * *" (Art. XXXVI, 2 Stat., 50; Art. 40, p. 283, Rev. Stat.).

Per Reed, J. in *Davis* v. *Township of Delaware*, 41 N. J. L. Rep., 55, 57 (cited in the dissenting opinion of Mr. Justice Brown in *United States* v. *Finnell*, 185 U. S., 248):

> The rule is that a record imports such absolute verity that no person against whom it is produced shall be permitted to aver against it. And this rule is of equal force whether the record is involved directly or collaterally. The leading case upon this branch of estoppels is that of *Rex.* v. *Carlile*, 2 B. and Ad., 392.

c. To intelligently interpret the following language of Article 43, viz:

> *The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest;* * * *

is not quite as simple a proposition as might be inferred from the language of the majority opinion below (R. 25), which reads as follows:

> To the court it seems evident that the statute means what it says, * * * and that meaning can not be expressed in plainer or simpler or more positive language than that used in the statute * * *.

Doubtless the language we have above italicized had a meaning plainly intelligible in the original statute from

which it was reenacted in the act of July 17, 1862 (12 Stat., 604), which was compiled into the Revised Statutes; but evidently that meaning had not even the remotest relation to the jurisdiction of a general court-martial. *Therefore it has no such relation now.* It was originally enacted in the act entitled "An act for the better government of the Navy of the United States," approved April 23, 1800 (2 Stat., 45), Article 38 of which reads as follows:

> Art. XXXVIII. *All charges, on which an application for a general court-martial is founded, shall be exhibited in writing to the proper officer, and the person demanding the court shall take care that* the person accused be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest, * * * (*ib.* 50).

The words in said Article XXXVIII, which we have above italicized, are omitted from article 15 of the act of July 17, 1862 (12 Stat., 604), from which article 43, in the Revised Statutes, page 283, is literally transcribed. They plainly refer to a time when any officer of the Navy could prefer a charge and specification against a brother officer for a military offense with a view of having the offender tried by a court-martial on that charge. No officer was to be arrested for trial for such an offense until the accuser had put the charge and specification into writing and furnished a copy of it to the accused. This manly practice in our naval service put the accuser and accused on an equal footing before the officer who had

jurisdiction to order the offender into arrest and to determine whether the latter should or should not suffer the indignity of being subjected to a trial before a general court-martial. Substantially the same manly principle is still strictly observed between brother officers in our Navy. Of course this principle does not mean that an officer could not be summarily arrested for a serious breach of duty. (See Art. 24, Rev. Stat., 281; Art. 30, 2 Stat., 49.)

A similar time-honored manly custom has always existed in the Navy in regard to enlisted men who violate any of the rules for the government of the Navy; it is called the Order to the Mast. This ceremony is described at length by the Navy Department in Appendix A, p. 25, *post*. Suffice to say that when an enlisted man commits such an offense he is "ordered to the mast" for a hearing, whereupon he is verbally charged with the offense, has a hearing before the commanding officer of the vessel, who then considers the statements of the parties and witnesses and orders the person so charged either to return to duty or to be put in arrest to await trial by court-martial. Of course in the latter event the ceremony is in the nature of a hearing and commitment before a committing magistrate, and is preliminary to a report of the facts by the commander of the vessel to the officer who is authorized by law to draft and prefer the charge and specification of the offense committed and to convene a general court-martial for the trial of the offender. That officer, in the case at bar, was the admiral commanding in chief the Asiatic

Squadron; and in the same case the accused was furnished a true copy of the charge and specification of his offense four (4) whole days before he was arraigned in the court-martial. (R., 12, V. 13, 19 C.) Obviously, therefore, a sailor's rights and liberties are as well respected in our Navy as are "the most sacred questions of human rights on trial in any court of justice." (R., 26.)

Indeed we might be allowed to say here that a sailor's rights and liberties are better guaranteed on our vessels of war than are those of our most favored citizens on shore, and there is no occasion for any civil judge or court to assume the robes of the chancellor for his protection merely because sailors may have been considered in early days as "a strangely improvident class of men," whose whole course of life was one of "generosity, credulity, extravagance, heedlessness, and bravery" (R., 7). They are abundantly able to take care of themselves and of the nation at sea. There they are our guardians.

When a civilian is arrested on shore for the most heinous crime against the United States, the act of Congress says, it is sufficient to give him a copy of the indictment *three* whole days before his trial if he was arrested for treason, or *two* whole days if he was arrested for any lesser crime. This act is almost as old as the Constitution (act of April 30, 1790, ch. 9, sec. 29, 1 Stat., 118; Rev. Stat., 1033). It does not limit the jurisdiction of our judicial courts in criminal cases. It follows the principle of the English statutes of 7 W.

III, ch. 3, sec. 1, and 7 Anne, ch. 3, sec. 11; ch. 21, sec. 11.

United States v. *The Insurgents*, 2 Dall., 334, 341.

United States v. *Wood*, 3 W. C. C., 440.

United States v. *Curtis*, 4 Mas. C. C., 232.

The Supreme Court of the United States says that when a sailor is put in arrest for violating one of the articles for the government of our Navy, if he be furnished a true copy of the charge and specification of that offense *four days* before he is brought before a court-martial, this is "a sufficient compliance" with Article 43 (*Johnson* v. *Sayre*, 158 U. S., 109, 118); therefore it is not material what any other court may say on that question, and of course we must assume, in the absence of proof to the contrary, that the sailor always gets a speedy trial.

II.

The Court of Claims has no jurisdiction whatever to nullify the lawful sentence of any duly convened court-martial, nor to impugn by doubts or reflections the fairness and justice of a lawful sentence of any court-martial. The most that any civil-judicial court can do in regard to any court-martial is to determine whether the court had jurisdiction to try and sentence the prisoner. But the court-martial jurisdiction can not be inquired into in any collateral proceeding, such, for example, as in a suit to recover judgment in the Court of Claims for the wages of seamen or coal passers in the United States Navy which were forfeited, as in

this case, by the sentence of duly convened general court-martial. (*Ex parte* Watkins, 3 Pet., 193, 201.)

This doctrine is not a novel one in the judicial courts. We might, therefore, very properly close our brief for appellants here.

But as the Navy Department is justly much aggrieved and its court-martial records are jeopardized by the majority judgment and opinions of the court below, we shall go on to cite and discuss a few of the opinions of the Supreme Court in regard to the question presented by this appeal. Before we begin the discussion, however, we most respectfully say that the last majority opinion of the court below (Rec., 22–27) does not state the law correctly as to the jurisdiction of a general naval court-matial, because it ignores the principle that good law "is the perfection of reason." Measured by that wand it would fail to convince a sailor's reason, much less a lawyer's, especially if the latter have any knowledge of naval affairs and necessary discipline.

Can it reasonably be said that the framers of Article 43 intended that it should be interpreted to mean that if an officer or enlisted man in the naval service of the United States should strike or assault his superior officer on the quarter-deck of a vessel of war—perhaps in presence of the enemy—or refuse to obey the lawful order of his superior officer, such an offender can not be tried by a naval court-martial unless he be furnished on that very day a true copy of the charge and specification of that offense?

Of course every officer and enlisted man in the Navy knows that such an offense is a most grave military one, and that the offender must at once be ordered into arrest—and placed in irons if necessary, else there would be an end to all discipline. Every officer and enlisted man in the Navy also knows that the admiral commanding a squadron or fleet on a foreign station is the only officer of the Navy who can convene a general court-martial, and who can prefer a charge and specification of such an offense committed on one of his vessels and order the offender to be tried by general court-martial.

Where might the flagship be at such time? Where the offender's vessel? The former at Cavite, P. I., perhaps, the latter, as in this suit, at Iloilo Harbor. (The logs of the vessel on the foreign station would show.) Must all of the vessels of the squadron or fleet be always within twenty-four hours of the admiral in command while on a foreign station? Or must the offender be free from arrest until the admiral hears of the offense, prefers the charge, convenes a general court-martial, sends the written charge to the judge-advocate of that court, and the latter, or some other officer, has furnished a copy of that charge and specification to the offender? If there be any logic in the opinions of the majority of the court below, such logic is an affirmative answer to these questions.

These questions were all adversely decided in *Johnson* v. *Sayre* at the October term of 1894 (158 U. S.,

109–117). Delivering the opinion in that case, Mr. Justice Gray said:

> The provision of article 43 of the Articles for the Government of the Navy, which prescribes that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest" (on which Sayre relied before the court-martial, and in this court), evidently refers, as appears by the very next article, to the time when he "is arrested for trial" by court martial, and not to the time of any previous arrest, either by way of punishment, or to await the action of a court of inquiry. Rev. Stat., § 1624, arts. 24, 43, 44, 45. Sayre, being already in custody to await the result of a court of inquiry, could not be considered as put under arrest for trial by court-martial, before the Secretary of the Navy had informed him of the report of the court of inquiry, and had ordered a court martial to convene to try him. Immediately after that, and four days before the court martial met, he was furnished with a copy of the charge and specification on which he was to be tried. This was a sufficient compliance with the article in question. And it is, at the least, doubtful whether the objection that it had not been sooner delivered to him did not come too late, after he had admitted before the court martial that he had received a copy of the charge and specification, and after objections to the jurisdiction of the court and to the form of the accusation had been made and overruled, and he had pleaded not guilty, and the evidence for the United States had been introduced.

> The court martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise. *Dynes* v. *Hoover*, 20 How., 65, 82; *Ex parte Reed*, 100 U. S., 13; *Ex parte Mason*, 105 U. S., 696; *Smith* v. *Whitney*, 116 U. S., 167, 177–179.

In appellee's case, of course, no court of inquiry was held because he was not an officer. But we must know, according to Navy custom, that he was 'ordered to the mast' on May 26, 1899; he was then reported to the commanding officer of his vessel as having refused to do duty—one of the most serious offenses known to military law—and on the same day he was, by order of that officer, put under sentries as a prisoner for safe-keeping, to await trial by a general court-martial. He was, therefore, continuously held a prisoner thereafter until July 5, 1899, when he was sent before a general court-martial to be tried for that offense.

In the case of *Johnson* v. *Sayre*, it appears that the accused, at the time of his trial, objected to the court-martial that a copy of the charge and specification had not been delivered to him sooner; and he also objected to the jurisdiction of the court, and to the form of the accusation, before he pleaded "not guilty." The appellee here made no such objection.

The Supreme Court evidently regarded such objections as not affecting the jurisdiction of the court-martial, because, to again quote from the opinion, "the court-martial having jurisdiction of the person accused

and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise."

In the present court-martial case, it was expressly admitted by the accused, in response to a question by the judge-advocate, that he had received a copy of the charge and specification preferred against him, at 10.30 a. m. on July 1, 1899 (R., 13, 19)—the identical charge and specification upon which he was tried on July 5 following. He stated to the court that he did not desire counsel, and that he did not object to any member of the court; and upon arraignment, after the reading of the charge and specification preferred against him, to each he pleaded "Not guilty." He made no objection whatever at any stage of the proceedings, and he had a full and fair trial by a duly constituted military tribunal. (R., 11–22.)

But without regard to any such small technical points of estoppel we maintain that the following proposition is sound law, namely:

> That where a court-martial has jurisdiction of the person accused, and of the offense charged, and has acted within the scope of its lawful powers, its erroneous rulings, if any, can not be reviewed or set aside by any civil court; and that a neglect or failure on the part of an officer whose duty it was to furnish the accused with a copy of the charge and specification preferred against him, at the time prescribed by the statute (if so prescribed), could not possibly affect the jurisdiction of the court—and *a for-*

> *tiori* when it appeared to the court that the accused had four days before trial been furnished a copy of the charge and specification, and made no objection whatever in respect to the time it was furnished to him.

In other words, even though the interpretation of Article 43 by the court below could be regarded for a moment as a sound one, our contention would still be that neglect or failure to furnish the accused with a true copy of the charge and specification, at any particular time before his trial, would, at most, be merely an error of procedure, and that irregularities of process or procedure either before or during a trial by a court-martial do not oust the jurisdiction of the court.

In this view of the case the main question of law before the court is as to the jurisdiction of the court-martial which tried and sentenced John Smith (the appellee).

In such cases, said Chief Justice Drake, delivering the opinion of the Court of Claims in *Keyes* v. *United States*—a court-martial case—(15 C. Cls. R., 532–541):

> No doctrine is better settled than that judicial proceedings can be assailed or questioned collaterally only when the court in which they occurred was without jurisdiction to take them.

And his honor, the present chief justice of that court, then concurring, said:

> I am of the opinion that when an officer has been removed and his successor appointed and confirmed, this court can not inquire into the legality or regularity of his removal.

Affirming the judgment of that court in that case (109 U. S., 336, 339), Mr. Justice Blatchford, delivering the opinion of the Supreme Court, said:

> It was held by this court in *Blake* v. *United States* (103 U. S., 227) that the President has the power to supersede or remove an officer of the Army by the appointment of another in his place, by and with the advice and consent of the Senate, and that such power was not withdrawn by the provision of § 5 of the act of July 13th, 1866, c. 176, 14 Stat., 92, now embodied in § 1229 of the Revised Statutes, that "no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." It was held that this provision did not restrict the power of the President, by and with the advice and consent of the Senate, to displace officers of the Army or Navy by the appointment of others in their places.

The doctrine so stated was held sufficient for the affirmance of the judgment of the Court of Claims, which dismissed the petition in that case. Nevertheless, Mr. Justice Blatchford, answering the contention of counsel that the record of the court-martial must affirmatively show not only jurisdiction, but regularity of proceedings, said:

> That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever

> irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid, when it is questioned in this collateral way. (*Thompson* v. *Tolmie*, 2 Peters, 157; *Voorhees* v. *Bank of United States*, 10 id., 449; *Cornett* v. *Williams*, 20 Wallace, 226, 249.) This doctrine has been applied by this court to the judgment and sentence of a naval general court-martial which was sought to be reviewed on a writ of *habeas corpus*. (*Ex parte Reed*, 100 U. S., 13.)
>
> Where there is no law authorizing the court-martial, or when the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

The doctrine there stated is that whatever irregularities or errors are alleged to have occurred *in the proceedings*, 'the sentence of a court-martial must be held valid when it is questioned in a collateral way, if the court-martial had jurisdiction of the accused and of the offense charged against him.' And this doctrine is again affirmed and reaffirmed in *Johnson* v. *Sayre*, 158 U. S., 109, and *Carter* v. *McClaughry*, 183 U. S., 365.

Now, it may be asked, *What irregularities or errors does the word "proceedings" include?* The word is evidently used as a law term, and the Supreme Court at the preceding Term of 1882 furnished a very comprehensive definition. Mr. Justice Miller, delivering the opinion of the court in *Kring* v. *Missouri* (107 U. S., 221, 231), said: "The word 'procedure,' as a law term, is not well understood;" and adopting its definition by

Bishop, "the distinguished writer on criminal law in America," he defined its meaning as follows:

> The term "procedure" is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms—Pleading, Evidence, and Practice. * * * The word [Practice] means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and Evidence, he says, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.

In *Swaim* v. *United States* (165 U. S., 553, 565) the doctrine is again well reaffirmed that—*Where a court-martial had jurisdiction over the person and the case, its proceedings can not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority.* All of the many errors alleged in that case were alleged errors of procedure (28 C. Cls. R., 216). "These," said the now chief justice of the Court of Claims, "can not be reviewed collaterally;" and in affirming the judgment of the Court of Claims in that case the Supreme Court said that instead of considering the several propositions urged by counsel, "we might well content ourselves with a reference to the able and elaborate opinion of the Court of Claims delivered by Justice Nott."

See *Johnson* v. *Sayre*, 158 U. S., 109, and also *Carter* v. *McClaughry*, 183 U. S., 365, where the rule is "*reit-*

erated" that *civil tribunals will not revise the proceedings of courts-martial, except for the purpose of ascertaining whether they have jurisdiction of the person and of the subject-matter, and whether, though having such jurisdiction, they have exceeded their powers in the sentence pronounced.*

III.

In conclusion, we again say that all that any civil court can do in a court-martial case is limited to questions respecting the jurisdiction of the court-martial. It is well settled that if the latter court has jurisdiction of the person to be tried and of the offense charged against him, the President of the United States alone has final and exclusive appellate power to review its proceedings and set aside its sentence, even when a commissioned officer of the highest rank is sentenced to be dismissed. He is "the court of last resort" (*Carter* v. *McClaughry, supra*, 385).

Speaking for the Supreme Court in *Elliott* v. *Piersol* (1 Pet., 328), Mr. Justice Trimble said:

> When a court has jurisdiction, it has the right to decide every question which occurs in the cause. And whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. * * * They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

Hence the urgent necessity for an appeal in this case.

We do not care to resort to the doctrine of estoppel to escape a judicial determination of the important question presented in this case. In view of the large number of claims for forfeited wages in like naval court-martial suits which are now encumbering the dockets of the Court of Claims and imposing so much irksome and, we think, unnecessary work not only on the court below and counsel for the defendants but also upon the Navy Department, we respectfully suggest that the jurisdiction of the Court of Claims in such cases should now be clearly defined. Until this is done, attempts will be made from time to time by needy solicitors of claims in that court who prowl around our military prisons and seek to instigate contempts in the naval service for military discipline by courts-martial, and of the Commander in Chief himself, by bringing such suits in that court. Therefore, neither the sentences of these military courts, nor the action of the Admiral or the Secretary of the Navy or of the President upon them, should ever be regarded as void by that civil court, except perhaps upon the very clearest jurisdictional grounds when the court-martial case was *coram non judice*. (*Wise* v. *Withers*, 3 Cr., 331, 337.) When general courts-martial are convened by the Secretary of the Navy, or by the commander in chief of a fleet or squadron, in contemplation of law they are convened by the President himself as Commander in Chief of the Navy. (*Wilcox* v. *Jackson*, 13 Pet., 498, 513; *Eliason* v. *United States*,

16 Pet., 291, 302; *Williams* v. *United States*, 1 How., 290, 297.) He alone is "the court of last resort," and all officers and seamen may appeal to him.

As long as this constitutional exclusive jurisdiction of the Commander in Chief is admitted in and respected by the civil judicial courts our Armies and Navies will continue to be—what they always have been—INVINCIBLE.

Respectfully submitted.

LOUIS A. PRADT,
Assistant Attorney-General.

FELIX BRANNIGAN,
Assistant Attorney.

APPENDIX A.

(Referred to on page 9 *ante.*)

UNITED STATES OF AMERICA,
NAVY DEPARTMENT.

I hereby certify that the annexed (original) statement of procedure in the cases of officers and enlisted men of the Navy brought to trial before general courts-martial from the date of initial report of misconduct to arraignment was prepared at the request of the Department of Justice by Captain S. W. B. Diehl, Judge-Advocate-General of the Navy; and that the extracts from the Navy Regulations appended thereto are copies of such regulations as they existed in May, June, and July, 1899.

In testimony whereof I have hereunto set my hand, and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this twenty-second day of July, in the year of our Lord one thousand nine hundred and four, and of the independence of the United States the one hundred and twenty-ninth.

[SEAL.] CHAS. H. DARLING,
Acting Secretary.

STATEMENT.

Prepared at the request of the Department of Justice (letter July 11, 1904, Mr. Assistant Attorney-General L. A. Pradt), in response to the following questions:

1. When an enlisted man in the Navy commits an offense, for which he is afterwards tried by a general court-martial, what action is taken

in that matter—step by step—from the date of the offense to the time of the trial, according to the Rules and Regulations and Customs of our Navy?

2. When an officer in the Navy commits an offense, for which he is afterwards tried by a general court-martial, what action is taken in that matter—step by step—according to the Rules and Regulations and Customs of the Navy?

The several steps in the case of a trial by general court-martial, from commission of offense to arraignment for trial, according to practice on board naval vessels to which I have been attached from time to time during the period of my service, 35 years, in the Navy, may be briefly stated as follows:

1. Report of misconduct is made to the captain, usually in the form of a written statement of the circumstances, names of witnesses, and reference to papers, if any, relating to the charge. (Regs., Art. 1073, par. 1.)

2. Personal investigation is made of the report by the captain immediately if the case requires summary action, but in ordinary cases on the following morning. (Regs., Art. 1091, par. 2.)

3. This investigation consists in a hearing "at the mast" (Regs., Art. 1091, par. 1), i. e., at a place on board ship designated for such purpose. The person accused, being summoned "to the mast," is informed of the report against him by the captain, who hears what, if anything, he has to say in denial, explanation, or excuse of the alleged misconduct. (Regs., Art. 1073, par. 2.) Any persons whom the accused wants questioned in his behalf are sent for and interrogated. The person accused being thus made fully acquainted with

the charge against him and his side of the matter being heard, the captain determines whether the case is one that can be disposed of without resort to a general court-martial. (Art. 1073, first clause.)

4. If after such investigation the captain is satisfied that the accused should be brought to trial before a general court martial, a detailed statement of the circumstances under which the offense was committed, with lists of witnesses, papers, including statement of the accused, is transmitted to the Secretary of the Navy or the commander in chief of the fleet or squadron (Article 1076), who alone may convene general courts. (Sec. 1624, R. S., Art. 38.)

5. Pending action by the convening authority, the accused is placed under suspension or in arrest (Article 1076, last clause). While under such suspension or arrest the accused performs no duty. The necessary restraint may be effected by confinement, not solitary, or by placing the accused in irons, or by simply restricting him to certain limits. Such restraint only is imposed as is deemed necessary for safe-keeping (Art. 1089), and during its continuance the accused receives full rations and full pay.

6. If the convening authority decides that a court-martial is necessary, he proceeds at once to prefer charges against the offender and convene a court for his trial (Art. 1102).

7. The charges and specifications are then by the convening authority forwarded to the commanding officer in whose custody the accused is held awaiting trial.

8. The commanding officer, immediately upon receipt of the charges and specifications, causes the accused to be furnished with a copy thereof and notified of the

time and place of trial. In the case of an enlisted man the charges and specifications are usually read aloud to the accused, as well as delivered to him by the officer who is to serve as judge-advocate of the court, and note is made in the log of such action.

9. Up to this time the accused has been held in custody to *await action* by the convening authority. When the charges and specifications are placed in his hands, however, and he is notified of the time and place at which the court will convene, he is considered and treated as in *arrest for trial*, and is so informed.

10. Between the date of the investigation at the mast and the convening of a general court-martial, the accused is sometimes, for convenience, transferred to another vessel or command to await trial. In such case the officer to whose command he is transferred is charged with his safe-keeping, and also with the duty of seeing that he is promptly furnished with a copy of the charges and specifications and notified of the time and place of the trial.

11. The accused thus receives a copy of the charges and specifications some days before the court convenes. The precise number of days is not fixed by regulation or practice and varies according to circumstances.

12. Before arraignment the accused is asked whether he has received a copy of the charges and specifications; if so, when, and whether he is ready for trial. His answers to these inquiries are entered in full in the record of the court.

While the foregoing statement has been drawn with especial reference to the cases of enlisted men brought to trial by general court-martial, the course pursued in the cases of commissioned and warrant officers is substantially the same. The chief differences are that in

the case of officers there is usually no preliminary oral hearing, in lieu of which reports of the alleged offence are made in writing and referred to the accused for such statement, if any, as he may have to make. Officers are placed under suspension or in arrest pending action by the convening authority upon reports against them, and in sufficient restraint to insure their appearance before the court. The precept convening the court is usually accompanied by an order directing that the accused be furnished with a copy of the charges and specifications, and placed in arrest for trial.

Extracts from the regulations governing the foregoing practice, substantially as they existed in May, June, and July, 1899, but for convenience of reference quoted from the current edition, are hereto appended.

Respectfully submitted.

S. W. B. DIEHL,
Judge-Advocate-General.

Extracts from the regulations governing the administration of discipline in the Navy, with particular reference to the prescribed procedure between the commission of an offense and the arraignment of the accused before court-martial.

ART. 1073. (1) In order to avoid unnecessary recourse to courts of inquiry and general courts-martial, it is directed that where an officer or other person shall be reported for grave misconduct to his immediate commanding officer, the latter shall institute a careful inquiry into the circumstances on which the complaint is founded. To this end he shall call upon the complainant for a written statement of the case, together with a list of his witnesses, mentioning where they may be found, and a memorandum of any documentary evidence bearing upon the case which it may be in his power to produce.

(2) He shall also call upon the accused for such counter statement or explanation as he may wish to make, and for a list of the persons he desires to have questioned in his behalf. (Art. 1033, Regs., 1896.)

ART. 1076. If, upon such investigation, the commanding officer shall be satisfied that the charge is such as to call for judical action, he shall transmit to the Secretary of the Navy, or to the commander in chief of the fleet or squadron, as the case may require, a particular statement of the misconduct with which the accused is charged, embracing such detail of the circumstances and of the time and place at which they occurred, with lists of witnesses and statement of the accused, as may enable the convening authority to decide upon the propriety and expediency of ordering a court, and to frame charges and specifications should it be ordered. Under such circumstances the accused may be continued under suspension or arrest to await the decision of the convening authority. (Art. 1037, Regs., 1896.)

ART. 1077. (1) Should the decision of the Secretary or commander in chief be that no trial is to take place, the accused shall be at once released and restored to duty. But if it be decided that the accused shall be brought to trial, the court shall be assembled for that purpose as soon as the nature of the case and the interests of the public service will allow, unless, meanwhile, such information or explanation shall reach the convening authority as to make it advisable to withdraw the charges and restore the accused to duty. (Art. 1038, Regs., 1896.)

ART. 1078. Whenever an accusation is made against an officer, either by report or by indorsement upon a communication, a copy of such report or indorsement shall be furnished at the time to the officer accused. (Art. 1039, Regs. 1896.)

ART. 1084. No officer placed under suspension or arrest shall be confined to his room or restrained from the proper use of any part of the ship to which, before his suspension or arrest, he had a right, except the

quarter-deck, poop, and bridges, unless such confinement or restraint shall be necessary for the safety of the ship or the preservation of good order and discipline; and neither the confinement nor the additional restraint shall be imposed for any longer time than shall be absolutely necessary. (Art. 1045, Regs. 1896.)

ART. 1087. The authority to punish offenses being strictly defined by law, no deviation from the limits prescribed will be tolerated. (Art. 1048, Regs. 1896.)

ART. 1088. Captains of ships only are empowered by law to inflict punishment of their own authority; and they are not empowered to impose upon persons under their command any other punishment than those precribed in Art. 24 of the Articles for the Government of the Navy, except in pursuance of the sentence of a general or summary court-martial. (Art. 1049, Regs. 1896.)

ART. 1089. When any enlisted person is confined for a longer time than ten days to await trial by court-martial, the captain shall keep in view the fact that this confinement is protracted simply to insure the appearance of the prisoner before the court by which he is to be tried. He should not, therefore, be subjected to greater rigor than is necessary to effect that object. (Art. 1050, Regs. 1896.)

ART. 1091. (1) All reports of misconduct shall be investigated by the captain before punishment is adjudged. At morning inspection he shall be furnished by the executive officer with a list of persons reported for offenses during the preceding day. After inquiring into the facts in each case *at the mast*, giving to both accuser and accused an impartial hearing, he shall assign a punishment when necessary and affix his signature in the report book.

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(3) The investigation of a report, except where summary action is deemed necessary, shall be deferred until the morning following the day on which the report is made; but longer delay shall be avoided. (Art. 1052, Regs. 1896.)

ART. 1102. If, in the opinion of the commander in chief or senior officer present, a trial by court-martial is necessary, and the alleged wrong shall have occurred within the waters of the United States, he shall submit a succinct report of the case, together with all the correspondence relating thereto, to the Secretary of the Navy, unless, as commander in chief of a fleet or squadron within the waters of the United States, he be expressly authorized by the President to order courts-martial. Officers empowered to order courts-martial will in such case proceed at once to prefer charges against the offender and convene a court for his trial. (Art. 1064, Regs. 1896.)

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